JUDICIAL DETERMINATIONS BY ADMINISTRATIVE COMMISSIONS[1]

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One of the most striking features of our constitutional law is the persistent purpose to protect the liberties of the people from arbitrary power by vesting the functions of sovereignty in three coördinate departments of government. This division is accomplished by express provisions in some state constitutions and by necessary implication in all constitutions, federal and state. By judicial construction the legislature may not exercise judicial or administrative powers; the executive may not exercise legislative or judicial powers, and the judiciary is denied the exercise of legislative or administrative powers. This fundamental principle of constitutional law is established by judicial decisions, both state and federal, of long standing and uninterrupted unanimity.

A commission is an administrative body; may it exercise judicial functions, and if so to what extent? The question involves, first, a definition of judicial functions; second, a statement of the exceptions to the rule that judicial powers may not be exercised by the administrative department; and, third, an appreciation of the relation of judicial determinations to the regulatory powers vested in commissions. We may then consider whether or not the present scope of judicial determinations by commissions, and the court review of such determinations, are satisfactory.

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I. JUDICIAL ACTS

In the Prentiss case (211 U. S., 210, 226), Mr. Justice Holmes speaking for the supreme court, said:

"A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end."

Judicial acts or power have been defined in many opinions, but in none has it been stated more concisely and comprehensively than by Mr. Justice Holmes. This definition states the nature of a judicial act and provides a ready test whereby we may determine whether or not specific acts by a commission involve the exercise of judicial powers.

II. EXCEPTIONS TO THE CONSTITUTIONAL LIMITATION

The fundamental law apportions to three coördinate departments all the powers of sovereignty, and gives to each department the exclusive exercise of functions comprehended in a single word. The constitution of the United States does not attempt to define what is a legislative, a judicial, or an administrative function. These major divisions take no account of the fact that great governmental acts, to secure an efficient administration, must be wholly performed by a single department, and necessarily include the exercise of the three powers named.

Thus in the admission and deportation of aliens, the officers and boards performing executive duties investigate and determine with conclusive effect matters controlling the liberty and rights of persons. "The board is an instrument of the executive power, it is not a court." Yet these functions clearly are comprehended within the definition of judicial acts. In the collection of taxes and the administration of the revenue laws, officers and boards exercise powers that are manifestly judicial, and their determination affects the property rights of individuals. Yet it is not now questioned that these acts constitute "due process of law," and can be attacked only upon the ground of fraud, or that the officers have exercised powers not conferred by law. The land office in issuing patents for public lands determines matters

and issues that fall clearly within Mr. Justice Holmes' definition of judicial acts, yet the decisions of this administrative branch of the government are within the scope of its authority, and are conclusive upon the courts.

The postmaster-general acting under authority conferred by statute may exclude matter from the mails and absolutely destroy a private business or enterprise. Commissions, in the performance of legislative and administrative functions, determine rights affecting vast property interests and restrain the liberty of owners in the control and use of their property. We are therefore forced to find a generalization which, while preserving the fundamental law in reference to the division of powers, will delimit the exceptions to its operation.

Mr. Justice Curtis, speaking for the supreme court (Murray's Lessee et al., 18 How. 272, 284), said:

"To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper. . . . . .

"It is true, also, that even in a suit between private persons, to try a question of private right, the action of the executive power, upon a matter committed to its determination by the constitution and laws, is conclusive."

To administer legislative acts and to make the laws effective it is essential that the administrative officers, boards and commissions should exercise, in some degree, powers which are in their nature judicial. If, as was said in one of the cases, the administrative officers or boards were compelled to go to a court every time they were called upon to determine a matter judicial

in its nature, the delays attendant upon such a procedure would render a law regulating a business, or prescribing governmental action, of little effect since prompt and continuous action is always necessary in the administration of such laws. The public interest would suffer by delays. This is peculiarly true of the act to regulate commerce.

We must therefore consider the three divisions of sovereign power as referring to major acts and not to those actions which are incident to the performance of the major act. In creating new laws and regulations for the maintenance of the government and the conduct of business charged with a public interest, congress may prescribe what shall, and what shall not, be done by persons and corporations affected, how the law shall be administered, and to what extent administrative officers and tribunals shall be empowered to determine judicial questions which may arise in the administration and enforcement of the law. In doing this there is no disregard of the fundamental law; legislation in the interest of the public is thereby made effective. The true test, therefore, in any given case of administrative determination, is whether the judicial act is incident to the exercise of the major legislative power. If it be necessary to the efficient administration of a public law there is no infraction of the constitutional limitation.

III. RELATION OF JUDICIAL DETERMINATIONS TO THE REGULATORY POWERS OF COMMISSIONS

The administration and enforcement of law by commissions are, comparatively, of recent development. It is a new manifestation of the democratic spirit of the constitution providing for divided responsibility. The law devolves upon a non-political board of experts, chosen with reference to their special knowledge, experience and abilities in a particular field of economic endeavor, the exercise of great authority over business charged with a public interest and subject to governmental regulation. This method of administering law secures the concurrent action of a majority of the members of a commission in the determination of issues arising under the law. In the regulation of rail-

road property and the operation of the business it gives the consideration and decisions of several persons acting as a body before such property interests can be affected. It combines the spirit of the jury system with the intelligent action of competent judges. It gives the broad view and that flexibility and adaptability of administrative action and determinations so essential in the execution of regulatory laws. The commission must conform to well conceived statutory procedure; it must recognize and obey established rules of law; but within these limits it is to work out a prompt and efficient enforcement of the law with fair justice to persons while promoting the public welfare. In this field administrative efficiency requires that some judicial determinations shall be made promptly by the administrative tribunal charged with the execution of the law. Such determinations are incident to the prevalence of the law; and prompt determination is essential to the protection of the public and of individual rights.

The interstate commerce commission is the oldest commission and will be taken as typical. It exercises great powers over a vast territory, its jurisdiction being nearly coextensive with that of the supreme court of the United States. Its powers extend over a subject matter that is of the greatest importance to the welfare of the nation. It administers the regulatory power of congress, delegated in the act to regulate commerce, over nearly a quarter of a million miles of railroad, representing over sixteen billions of dollars of property. The securities of these great properties are held by private investors in this and in foreign countries. These properties earn annually a gross revenue of three and one-half billions of dollars. The business and its immediately dependent industries employ nearly two millions of employes. The railroads pay annually in taxes over one hundred and fifty millions of dollars, and in salaries and wages to employers an even larger sum; they carry two billion tons of freight and a billion passengers per annum.

In addition to the rail lines subject to the act, there are now included: carriers engaged in the transportation by means of pipe lines, of oil and natural and artificial gas; telegraph, tele-

phone and cable companies, wire and wireless; water carriers operating in connection with rail lines; traffic passing through the Panama Canal, and coastwise trade. These carriers represent property interests of great magnitude.

The powers of the commission, over this enormous volume of commerce, stated generally, are: fixing maximum individual and joint rates for passengers and freight; determining the reasonableness of classifications of freight and of the regulations and practices of carriers subject to the act; compelling the establishment of through routes and joint rates; prescribing divisions of joint rates between carriers where they cannot agree; requiring switch connections between railroads, and rail and water lines; deciding controversies between shippers and carriers under the act regarding the reasonableness of rates and charges, discriminations between shippers and between localities, and the unlawfulness of preferences or advantages to favored shippers; determining the right to charge a greater amount for a shorter than for a longer haul under the terms of the fourth section; ascertaining damages sustained by shippers on account of the failure of carriers to obey the act; systematizing accounts kept by these carriers; instituting criminal proceedings to collect penalties for violations of the act, and civil proceedings to compel the observance of the act; and, in general, enforcing the law and securing observance of it by all carriers subject to it.

When we consider that transportation lies at the foundation—is, in fact, the foundation—of all national growth and development, political, commercial, industrial and social, and that in regulating transportation the whole superstructure of society is involved, the magnitude of this jurisdiction is almost appalling. For seven men to hold in their power and subject to their decisions the matters which determine the amount of gross and net revenues which these carriers may realize from their business, the practices which may, or may not, be adopted by carriers for the advancement of their business, and the publicity which shall be given to their affairs, has no parallel in the range of governmental administration. Private property rights of vast proportions are involved in the decisions of the commission.

And yet, if such power must be exercised—and it must be—how much better and safer it is to place the administration of the law in the hands of seven men than it would be to leave it to a single officer, or to break it up into parts and assign a part to each of several officials not required to act as a body. How important it is that these great functions should be exercised by a tribunal unhampered by political influences, and composed of men of the highest integrity, of expert knowledge and experience in the subject.

Let us now observe wherein judicial determinations are essential to the administration of this great law, using an illustrative case. In the Abilene Cotton Oil Case (204 U. S., 426), a shipper elected to maintain an action at law against a common carrier to recover damages sustained by the exaction of an unreasonable rate upon shipments made by the shipper.

This case was tried, and reached the supreme court of the United States. It was conceded by the supreme court that at common law such an action could be maintained, but the underlying question in the case was the effect of the act to regulate commerce upon the common law jurisdiction of the courts in such cases. The court reviewed the act as a whole and stated its purpose as follows (page 439):

"That the act to regulate commerce was intended to afford an effective means for redressing the wrongs resulting from unjust discrimination and undue preference is undoubted. Indeed, it is not open to controversy that to provide for these subjects was among the principal purposes of the act. . . . . And it is apparent that the means by which these great purposes were to be accomplished was the placing upon all carriers the positive duty to establish schedules of reasonable rates which should have a uniform application to all and which should not be departed from so long as the established schedule remained unaltered in the manner provided by law."

The power of the commission is stated as follows (page 438):

"Power was conferred upon the commission to hear complaints concerning violations of the act, to investigate the same, and, if the complaints were well founded, to direct not only the making

of reparation to the injured persons, but to order the carrier to desist from such violation in the future."

The court held that the commission was empowered to determine the question whether rates complained of were unreasonable and if unreasonable to fix reasonable maximum rates and order the published rate changed to comply with its order; and that this jurisdiction must be exclusive in the commission to secure that uniformity of rates which the statute was intended to secure. This was pointed out by the court in the following language (page 440):

"For if, without previous action by the commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that unless all courts reached an identical conclusion a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question. Indeed the recognition of such a right is wholly inconsistent with the administrative power conferred upon the commission and with the duty, which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed."

Summarizing the court said (page 448):

"Concluding, as we do, that a shipper seeking reparation predicated upon the unreasonableness of the established rate must, under the act to regulate commerce, primarily invoke redress through the interstate commerce commission, which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule, because the rates fixed therein are unreasonable, it is unnecessary for us to consider whether the court below would have had jurisdiction to afford relief if the right asserted had not been repugnant to the provisions of the act to regulate commerce."

This case has been improperly characterized as judicial legislation for the reason that it destroyed the right to bring a common law action in a court in the first instance, to recover damages for

an unreasonable charge by a common carrier. The court construed the act so as to attain the legislative object—uniform rates—and this made it necessary that the existing common law jurisdiction should be taken from the courts and vested in the administrative tribunal. This, Mr. Justice Curtis intimated, in the quotation first cited, congress could not do. While the question of what is a reasonable rate is a question of fact, the determination of the question is arrived at by an examination of "present or past facts" and therefore is, in nature, a judicial inquiry.

In a series of cases since the Abilene Cotton Oil case was decided the supreme court has stated, with what one of the justices has denominated "tiresome repetition" that the commission has exclusive jurisdiction to determine whether an existing rate is unreasonable, and, if found to be unreasonable, to determine what would have been in the past, and what will be in the future, a reasonable rate; and to determine also what are undue and unreasonable discriminations and preferences. When these inquiries relate to present and past transactions the act is judicial, when the determination applies to future rates it is legislative in character. While the carriers have the right to initiate rates, the question of their *reasonableness* is always within the exclusive jurisdiction of the commission to determine. If rates are reduced by the commission, the revenues of the carrier from the traffic affected are reduced. The revenues, certainly the control of property, are affected, when the commission determines questions involving discrimination and preferences, the bookkeeping and the allocation of company accounts. The determination of such questions therefore involves the investigation of facts, and judicial determinations that directly affect property rights in a substantial manner. Yet such determinations are essential to the proper administration of the law.

I have presented the reasoning in the Abilene Cotton Oil Case, familiar probably to most of you, not for the purpose of showing the jurisdiction of the commission, but to show that the power of judicial determination vested in the commission is incident to, and a part of a great scheme of regulation, which

scheme is essentially legislative and not judicial in character. Because they are incident to the principal act, these judicial decisions do not fall under the prohibition of the constitution that administrative and legislative bodies shall not exercise judicial power. They come under the exceptions to that rule which permit judicial functions and powers to be exercised by legislative and administrative bodies. The making of the law is a major legislative act. The exercise of the judicial powers by the commission is an integral part of the administration of the law, necessary, as shown in the case we have been considering, to the realization of all the benefits secured by the act to regulate commerce.

IV. THE PRESENT SCOPE OF JUDICIAL DETERMINATION AND REVIEW IS SATISFACTORY

It must not be assumed that in the exercise of these great powers the commission can disregard the law creating it, or the principles of law which apply in judicial determinations. The commission is strictly under the law. The legality of its order depends upon its conformity to the law. Its orders may be reviewed by the district courts of the United States upon all justiciable issues, in a direct proceeding in equity under well defined procedure. Three judges, one of whom must be a circuit judge, sit in these cases and a majority opinion is required to annul an order. An appeal lies, from both interlocutory and final decrees of the district court, direct to the supreme court of the United States. In both courts these cases are expedited.

V. JUSTICIABLE ISSUES

The first concise statement of what are justiciable issues regarding the orders of the commission was made by the supreme court in the Union Pacific Case (222 U. S., 541, 547). Speaking through Mr. Justice Lamar, the court said:

"In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the commission acted within its power. It will not consider the ex-

pediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling."

In Int. Com. Comm. v. Louis & Nash. R. R. (227 U. S., 88, 92), Mr. Justice Lamar, again speaking for the court, said:

"The statute, instead of making its orders conclusive against a direct attack, expressly declares that 'they may be suspended or set aside by a court of competent jurisdiction.' . . . Of course, that can only be done in cases presenting a justiciable question. But whether the order deprives the carrier of a constitutional or statutory right; whether the hearing was adequate and fair, or whether, for any reason, the order is contrary to law—are all matters within the scope of judicial power."

The Chief Justice, speaking for the court in the Proctor & Gamble Case (225 U. S., 282, 297–298), said:

". . . . the courts were confined by statutory operation to determining whether there had been violations of the constitution, a want of conformity to statutory authority, or of ascertaining whether power had been so arbitrarily exercised as virtually to transcend the authority conferred * * *."

In determining whether there was substantial evidence before the commission the court will not undertake to determine the weight of the evidence or draw conclusions from it. This, as stated by the court in other cases, is peculiarly within the jurisdiction of the rate-making body. Nor will the court set aside an order because the commission has admitted evidence that would not have been admissible if objected to in a like contention before a court. The court will search the record to ascertain whether there was before the commission any legal evidence of a substantial character which, when considered by itself, would support the order.

VI. THE COMMISSION MUST ACT STRICTLY WITHIN ITS STATUTORY JURISDICTION

Reference to a few cases will show how strictly the commission is held within its statutory jurisdiction. In the Louisville and Nashville Case (227 U. S., 88, 91), the government insisted

that as the commission was an expert body possessed of technical and scientific knowledge upon the subject of transportation, an order based upon its "opinion" is conclusive. In response to this contention Mr. Justice Lamar, speaking for the court, said:

"But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless."

In the Electric Railway Case (226 U. S., 14, 20), the court reviewed an order entered by the commission which required the operation of standard equipment over an electric railroad. The railroad company insisted that such operation was unsafe. The commission, without notice to the parties, sent one of its expert men to examine the roadbed of the electric road. In its report this investigation was referred to and the decision of the commission was rested largely upon the private report of the expert. Reviewing this action Mr. Justice Holmes, speaking for the court, said:

"We remarked that it is stated in the commission's report that they base their conclusions more largely upon their own investigation than upon the testimony of the witnesses. It would be a very strong proposition to say that the parties were bound in the higher courts by a finding based on specific investigations made in the case without notice to them."

These two cases show how carefully the court protects the constitutional rights of parties, whose property is being affected, to a full hearing, of which they must have due notice.

In the Willamette Valley Case (219 U. S., 433, 449), an advance had been made by the railroad company in a lumber rate. The question before the commission was whether or not the new rate was unreasonable. The lumber companies proved that they had been induced, by a lower rate, to go into this valley and erect mills and therefore claimed what may be called an "equitable right" to have the old rate maintained. In the report of the commission these facts were discussed. The court, speaking through the chief justice, said:

". . . . when the opinion is considered as a whole in the light of the condition of the record to which we have referred it clearly results that it was based upon the belief by the commission that it had the right under the law to protect the lumber interests of the Willamette Valley from the consequences which it was deemed would arise from a change of the rate, even if that change was from an unreasonably low rate which had prevailed for some time to a just and reasonable charge for the service rendered for the future."

This order was annulled because the commission did not keep strictly within its jurisdiction and determine only the intrinsic reasonableness of the rate.

In the Lemon Rate Case the commission heard evidence upon, and discussed the competition of lemons produced in California with Sicilian lemons, in the eastern market. The commerce court (190 Fed., 591, 594–595), speaking through Mack, Judge, said:

"An examination of the report of the commission, ... in its entirety, demonstrates that except for two brief paragraphs suggesting grounds for lowering the lemon while maintaining the orange rate, it deals entirely with matters tending to show the need in this industry of a high-protective tariff against Sicily and, not on traffic considerations, but to compensate for the tariff insufficiencies, a low transportation rate especially to eastern territory."

For this reason the order of the commission was annulled.

In the Harriman Case (211 U. S., 407, 417–418, 419), the commission petitioned the court to compel a witness to testify and to furnish documentary evidence. The question involved was whether the commission had power to compel a witness to give testimony and furnish documentary evidence, in an unlimited investigation to qualify the commission to make a report to congress. The supreme court, speaking through Mr. Justice Holmes, said:

"And the result of the arguments is that whatever might influence the mind of the commission in its recommendations is a subject upon which it may summon witnesses before it and require them to disclose any facts, no matter how private, no matter

what their tendency to disgrace the person whose attendance has been compelled. If we qualify the statement and say only, legitimately influence the mind of the commission in the opinion of the court called in aid, still it will be seen that the power, if it exists, is unparralleled in its vague extent. Its territorial sweep also should be noticed. By section 12 of the act of 1887, the commission has authority to require the attendance of witnesses 'from any place in the United States, at any designated place of hearing.' No such unlimited command over the liberty of all citizens ever was given, so far as we know, in constitutional times, to any commission or court. . . . . ."

"Whatever may be the power of Congress, it did not attempt . . . . to do more than to regulate the interstate business of common carriers, and the primary purpose for which the commission was established was to enforce the regulations which congress had imposed. . . . ."

"We are of opinion . . . . that the purposes of the act for which the commission may exact evidence embrace only complaints for violation of the act, and investigations by the commission upon matters that might have been made the object of complaint. . . . . ."

While a wider range is given an administrative tribunal in receiving evidence upon which to determine its administrative action than is accorded to a court exercising purely judicial powers, yet from these decisions it clearly appears that the commission may not go outside of its statutory sphere of action in making orders, nor may it compel a disclosure of private affairs not directly related to matters about which the commission has power to enter an order. With this court review embracing all questions of law, and all alleged arbitrary action, full protection is given to personal and property rights.

VII. ADVANTAGES OF THE PRESENT PROCEDURE

Transportation questions which come before the commission are complex and often far reaching. A proposed change in a single rate may affect a group or structure of rates over a consid-

erable territory. The commission must regard the single rate as a court would do if determining its reasonableness, but before making an order the commission must go farther and consider the wider effect that may be produced by a change in the single rate. Rate structures are important and should not be unreasonably impaired. Ordering out a discrimination may operate unfavorably upon railroad revenues without producing any corresponding advantage. Discriminations prohibited are "undue" discriminations. Preferences condemned are "unfair or unreasonable" preferences. In determining these questions the commission must, as stated by an English judge, "exercise common sense" and take a wider view than is involved in a mere judicial controversy between a shipper and a carrier regarding a single rate. The power and the duty of the commission is finely stated by Mr. Justice McKenna (218 U. S., 88, 103):

"The outlook of the commission and its powers must be greater than the interest of the railroads or of that which may affect those interests. It must be as comprehensive as the interest of the whole country. If the problems which are presented to it therefore are complex and difficult, the means of solving them are as great and adequate as can be provided."

CONCLUSION

When we consider the purpose and scope of this law, the magnitude of the interests involved, the complexity of the questions of fact which arise in its administration and the necessity of having all questions of fact and law determined expeditiously as a part of the administration; and when we consider the further fact that in determining these questions the rate-making body must take a broad view of the subject under consideration, and not confine itself, as a court of law or equity is restricted in its investigation to the simple controversy between the parties before it, it must be apparent to every thoughtful student that these questions of law and fact should be primarily decided by the expert rate-making body. Broadly considered, the questions are essentially legislative in character, although technically some of them fall within the general defintion of judicial acts.

Considering the scope of the court review, that the commission is held strictly within statutory jurisdiction, and that any arbitrary power in a given case would render the order void upon appeal to the court, we may confidently assert that the present system for the determination of questions of law and fact in this great field of governmental action is wisely conceived and in its execution has proved satisfactory. If we may judge the wisdom of the law, and measure the satisfaction of all parties affected by the current results of its administration, we shall find abundant proof that the law is, in its general plan and working, satisfactory. During the year ending October 31, 1915, the number of formal cases decided by the commission in which published decisions were rendered was 902. Not all of these were affirmative orders which could be reviewed by a court; but a large majority were orders that were reviewable. During the same period the number of suits commenced in the district courts of the United States attacking the orders of the commission was 22. The number of cases decided by the courts during this period was 14, 13 were in favor of, and one was against the commission. The number of cases to enjoin orders now pending is 18 in the district courts and 7 in the supreme court. Without in any way reflecting upon the courts, we may confidently say that this record of opinions unappealed from and the successful maintenance of the orders in cases where appeals have been taken, is not equaled by any court of original jurisdiction in this country. This record of the commission's work bears potent testimony to the wisdom of the law and to the ability and integrity of the commission.